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Rikky Purba v Public Prosecutor

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COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO
Q-05-262-09 OF 2011
RAMLY ALI (NOW FCJ), ABDUL AZIZ ABD RAHIM AND ZAWAWI
SALLEH JJCA
13 JANUARY 2014

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*Criminal Procedure — Defence — General defences — Self defence and
provocation — Accused charged with murder and voluntarily causing hurt by
dangerous weapon — Whether accused provoked — Whether accused acted out of
self-defence — Whether accused rightly convicted under s 302 of the Penal Code
— Whether act attributed to accused constituted lesser offence of culpable homicide
not amounting to murder — Penal Code ss 302, 304 & 324*

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*Evidence — Credibility — Witness — Accused charged with murder and
voluntarily causing hurt by dangerous weapon — Wife of deceased primary
witness to incident and victim — Whether evidence should be treated with caution*

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The appellant was charged for murder, an offence under s 302 of the Penal
Code ('PC') and voluntarily causing hurt by dangerous weapon to one Jata ak
Masam ('PW12'), an offence under s 324 of the PC. The prosecution relied
primarily on the evidence of PW12 who witnessed the incident that
culminated in the death of her husband ('the deceased'). According to PW12,
she and the deceased were taking bath and went back to their room when the
appellant suddenly entered the room and stabbed the deceased repeatedly with

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two knives. The appellant then stabbed PW12's right hand three times as she
tried to get hold of the phone. PW12 then ran to the kitchen and managed to
get a hammer but the appellant stabbed her left thigh. She fell down and the
deceased came to her aid with a parang but fell to the ground. The appellant ran
to the veranda. Meanwhile, PW12 managed to call her sister ('PW13') for help

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and PW13 and an ambulance arrived to bring PW12 and the deceased to the
hospital. The external examination of the deceased's body revealed 28 injuries
and the fatal injury was one which pierced the heart. The appellant's defence
was one of provocation and self defence. In his defence, the appellant
submitted that a misunderstanding arose between him and the deceased when

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the appellant took two buckets of water from the bathroom. The appellant
hurried the appellant to finish fast as he had also wanted to take a bath. The
appellant averred that the deceased provoked him by uttering insulting and
provoking words and punching him in the face. The deceased then went to take
a parang and a sharp weapon and a fight ensued between the two of them. The

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Held, allowing the appeal in part:

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- A (6) The appeal on the ground of sudden and grave provocation was allowed but only to the extent that instead of a conviction under s 302 of the PC, the appellant would stand convicted for the offence of culpable homicide not amounting to murder punishable under s 304(a) of the PC. The insulting words must not be looked in isolation from the subsequent conduct of the deceased when he challenged, punched and reached for the parang. The insulting words served as the setting for the triggering of the second incident. Any reasonable man in such situation would be provoked and would be deprived of the power of self-control. The fact that there were 28 injuries sustained by the deceased did not affect the matter adversely to the appellant because a reaction to provocation necessarily involved a lack of ability to exercise restraint or to judge a situation with insight and balance (see para 50).
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- D (7) The defence of self-defence raised by the appellant did not fulfill the conjunctive requirements as provided under ss 96–106 of the PC and must fail. The record showed that the alleged injury sustained by the appellant had not been put to the prosecution witnesses and so they had no occasion to explain the same. The failure of the prosecution to tender the medical report of the appellant would not affect the prosecution case (see para 56).
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- F (8) The end of justice would be served if the appellant was sentenced to undergo 18 years of imprisonment with effect from the date of arrest. The court had taken into account that the loss of life, whether intentional or not, would always be a serious and heinous crime and society demands that it must be served with the appropriate sentence (see para 55).

[Bahasa Malaysia summary]

- G Perayu telah dituduh membunuh, satu kesalahan di bawah s 302 Kanun Keseksaan ('KK') dan dengan sengaja menyebabkan kecederaan menggunakan senjata bahaya kepada Jata ak Masam ('PW12'), satu kesalahan di bawah s 324 KK. Pendakwaan bergantung terutamanya kepada keterangan PW12 yang menjadi saksi kejadian yang menyebabkan kematian suaminya ('si mati'). Menurut PW12, dia dan si mati sedang mandi dan balik ke bilik mereka apabila perayu tiba-tiba masuk ke bilik dan menikam si mati berkali-kali dengan dua pisau. Perayu kemudian menikam tangan kanan PW12 sebanyak tiga kali apabila dia cuba mendapatkan telefon. PW12 kemudian lari ke dapur dan berjaya mendapat tukul besi tetapi perayu telah menikamnya di peha kirinya. Dia jatuh dan si mati datang untuk membantunya dengan parang tetapi rebah ke lantai. Perayu telah berlari ke beranda. Manakala, PW12 dapat memanggil kakaknya ('PW13') untuk pertolongan dan PW13 dan sebuah ambulans telah tiba untuk membawa PW12 dan si mati ke hospital. Pemeriksaan luaran ke atas badan si mati mendapati 28 kecederaan dan kecederaan yang membawa maut adalah yang menusuk ke bahagian jantung. Pembelaan perayu adalah provokasi dan mempertahankan diri. Dalam
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pembelaannya, perayu berhujah bahawa perselisihan faham timbul antara dia dan si mati apabila perayu mengambil dua baldi air daripada bilik air. Perayu menggesa perayu untuk cepat kerana dia juga hendak mandi. Perayu menegaskan bahawa si mati memprovokasinya dengan menyebut perkataan-perkataan yang menghina dan menimbulkan provokasi dan menumbuknya di muka. Si mati kemudian telah mendapatkan parang dan senjata tajam dan pergaduhan berlaku antara mereka berdua. Perayu kemudian telah masuk ke biliknya dan mengambil pisau dan sambung bergaduh. Perayu berhujah bahawa dia tidak ingat sama ada dia telah mencederakan PW12 kerana kedua-dua si mati dan PW12 menyeranganya berterusan dan dia melawan balik untuk membela diri sendiri. Dalam rayuan ini, isu-isu untuk ditentukan adalah sama ada perayu wajar dituduh di bawah s 302 KK; dan jika tidak, sama ada perbuatan yang dikaitkan dengannya merupakan kesalahan lebih ringan iaitu homosid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304(a) KK.

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Diputuskan, membenarkan sebahagian daripada rayuan:

- (1) Tiada sebab untuk menolak keterangan bahawa si mati yang memulakan provokasi itu dengan menghina dan menumbuk perayu. Perayu sepatutnya membuat pembelaan terhadap saksi pendakwaan (lihat perenggan 41).
- (2) Hakim perbicaraan sepatutnya menganalisa dan mempertimbangkan dengan teliti keterangan PW12 yang merupakan saksi berkepentingan dan mendatangkan mudarat kepada si mati dan membuat penemuan spesifik sama ada keterangannya dijejaskan atau dicemari dalam apa cara atau berasaskan apa-apa fakta berkenaan semua keadaan kes (lihat perenggan 43).
- (3) Versi perayu mesti diterima oleh mahkamah. Adalah adil untuk membuat inferens bahawa kelakuan berikut si mati dalam mencabar dan menumbuknya lagi dan semasa mencapai parang, telah menyebabkan perayu hilang kawalan diri. Dalam situasi yang dihadapi perayu, mana-mana orang yang waras akan melakukan perbuatan sama yang dilakukan oleh perayu (lihat perenggan 46).
- (4) Pembelaan tidak membuktikan kesnya sama seperti mana pendakwaan dan pembelaan hanya perlu membuktikan kesnya atas imbalan kebarangkalian bagi memberi hak kepadanya untuk bergantung kepada mana-mana pengecualian am KK. Adalah juga penting dalam senario yang memihak kepada tertuduh hendaklah diutamakan dalam kes-kes di mana pelbagai inferens mungkin dibuat daripada set fakta yang sama (lihat perenggan 47).
- (5) Tiada alasan atau sebab untuk perayu menyerang si mati kecuali ia dilakukan jika dia berhadapan dengan provokasi yang serius dan

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- A tiba-tiba. Aspek penting yang perlu diberi perhatian di sini adalah tiada permusuhan antara perayu dan si mati. Hubungan antara perayu dan si mati adalah mesra. PW12 menggambarkan hubungan yang mesra dan baik antaranya dan si mati dan dengan perayu pula, selama tempoh empat tahun. Adalah jelas bahawa perayu tidak melakukan jenayah yang telah difikirkan terlebih dahulu. Tiada apa-apa yang boleh mencadangkan bahawa perayu mempunyai perasaan permusuhan atau motif untuk melakukan apa-apa kesalahan terhadap si mati, apa lagi kesalahan serius seperti membunuh (lihat perenggan 48).
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- C (6) Rayuan atas alasan provokasi tiba-tiba dan serius dibenarkan tetapi hanya setakat tidak disabitkan di bawah s 302 KK, perayu disabitkan atas kesalahan homosid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah s 304(a) KK. Perkataan-perkataan menghina tidak patut dilihat berasingan daripada perbuatan berikut si mati apabila dia dicabar, ditumbuk dan mencapai parang. Perkataan-perkataan menghina itu bertindak sebagai permulaan tercetus kejadian kedua. Mana-mana orang waras dalam keadaan sedemikian akan diprovokasikan dan tidak mungkin dapat mengawal diri. Fakta bahawa terdapat 28 kecederaan yang dialami oleh si mati tidak menjejaskan perkara itu terhadap perayu kerana reaksi terhadap provokasi perlu melibatkan ketidakupayaan untuk melakukan kekangan atau mengadili keadaan dengan pandangan dan imbalan (lihat perenggan 50).
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- F (7) Pembelaan kawalan diri yang ditimbulkan oleh perayu tidak memenuhi keperluan konjunktif sebagaimana diperuntukkan di bawah ss 96–106 KK dan mesti gagal. Rekod menunjukkan bahawa kecederaan yang dikatakan telah dialami oleh perayu tidak dikemukakan kepada saksi-saksi pendakwaan dan oleh itu mereka tidak berpeluang menjelaskan yang sama. Kegagalan pendakwaan untuk mengemukakan laporan perubatan perayu tidak menjejaskan kes pendakwaan (lihat perenggan 56).
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- H (8) Keadilan akan berlaku jika perayu dihukum 18 tahun penjara bermula kuat kuasa dari tarikh tangkapan. Mahkamah mengambil kira bahawa kehilangan nyawa, sama ada dengan sengaja atau tidak, semestinya merupakan jenayah yang serius dan kejam dan demi kepentingan masyarakat maka hukuman bersesuaian patut diberikan (lihat perenggan 55).]
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Notes

For cases on witness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1295–1305.

Cases referred to

- Brown v United States* 256 US 335 (1921), SC (refd)
Budhi Singh v S State of HP, AIR 2013 SCW 457, SC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405;
 [2004] 3 CLJ 739, FC (refd)
Jagatheesen s/o Krishnasamy v PP [2006] 4 SCR 45, SC (refd)
Magendran all Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mahmood v State AIR 1961 All 538, HC (refd)
Megat Halim Megat Omar v PP [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523, CA (refd)
PP lwn Abdul Halim Ishak & Satu Lagi [2013] 9 CLJ 559, CA (refd)
PP v Abdul Razak bin Dalek [2007] 2 MLJ 255; [2006] 4 CLJ 129, HC (refd)
PP v Chee Cheong Hin Constance [2006] 2 SLR 24, HC (refd)
PP v Lasakke [1964] 1 MLJ 56 (refd)
PP v Selvarajoo all Ramachandran & Ors [2005] 5 MLJ 282, HC (refd)
Queen, The v McGregor [1962] NZLR 1069, CA (refd)
R v Ahluwalia [1992] 4 All ER 889, CA (refd)
R v Duffy [1949] 1 All ER 932 (refd)
Raju @ Balachandran and Ors v State of Tamil Nadu AIR 2013 SC 983, SC (refd)
Ramlagan Singh v State of Bihar [1973] 3 SCC 881, SC (refd)
SS Mujibur Rahman bin Mohd Sultan lwn Pendakwa Raya [2013] 3 MLJ 867;
 [2012] 1 LNS 1301, CA (refd)
Tai Chai Keh v PP [1948–1949] MLJ Supp 105b (refd)
Tan Chor Jin v PP [2008] 4 SLR 306, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

- Evidence Act 1950 s 105
 Penal Code ss 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106,
 300, 300 Exception 1, 302, 304(a), 324

Appeal from: Criminal Trial No 45–7 of 2010 (SC) (High Court, Sibul)

- Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appellant.*
Yaacob bin Hj Chik (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, Rikky Purba, was charged with (i) murdering one Vincent ak Sabang, an offence in contravention to s 302 of the Penal Code

A ('PC') and (ii) voluntarily causing hurt by dangerous weapon to Jata ak Masam, an offence in contravention to s 324 of the PC.

B [2] After a full trial, the learned trial judge convicted the appellant on both charges and sentenced him for the first charge to death and the second charge to six months of imprisonment with effect from the date of arrest (15 September 2008).

C [3] Aggrieved by the impugned conviction and sentence, the appellant has now appealed to this court.

D [4] We have heard learned counsel for the appellant and learned deputy public prosecutor at length and have carefully gone through the evidence on record. We partly allowed the appeal. We reduced the first charge against the appellant from one of murder under s 302 of the PC to culpable homicide not amounting to murder under s 304(a) of the PC and sentenced him to eighteen years of imprisonment which effect from the date of arrest. In so far as the second charge in concerned, we dismissed the appeal for lack of merit and we affirmed the conviction and sentence imposed by the learned trial judge.

E [5] We now give our reasons.

FACTS OF THE CASE

F [6] The factual matrix of this case has been set out in detail by the learned trial judge. We need not, therefore, recapitulate them except to the extent it is necessary to do so for the disposal of this appeal.

G [7] The prosecution placed primary reliance on the evidence of PW12 (Jata ak Masam), who witnessed the incident that culminated in the death of her husband, Vincent ak Sabang ('deceased'). According to PW12, on 15 September 2008, at 9.30am, she and the deceased were taking bath at their rented premise. After that, both of them went back to their own room.

H Suddenly, the appellant entered the room and stabbed the deceased repeatedly with two knives (exhs PE6A and PE10A). According to PW12, at this point in time, the deceased was unarmed and did not use any weapon to defend himself. The deceased screamed for help. PW12 tried to get hold of handphone inside the drawer of a tv cabinet inside the room but the appellant stabbed her on her

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[8] PW12 then ran to the kitchen. In the kitchen, PW12 tried to get the hammer (exh P3). She managed to get hammer but the appellant suddenly came and stabbed on her left thigh, with a knife which was to the same knife

used to attack the deceased. When she was attacked by the appellant, she fell down and lie on the floor asking for help from the deceased. The deceased came to help her. He came from the room and wielding a *parang* (exh PE4). The deceased was naked and his body was covered with blood. The deceased tried to help her but he fell down.

[9] The appellant then ran to the veranda. PW12 went to the room to take the phone and called her sister, PW13 (Bunga), for help. Subsequently, PW13 and ambulance arrived to bring PW12 and the deceased to the hospital.

[10] PW14 (ASP Yeoh Chun Shyan), the investigating officer, arrived at the crime scene on the same day at about 10.20am. He saw PW12 lying down in front of the premises. He also saw the deceased lying down at the hall of the premised. At the back of the premise, on the top of the balcony, he saw the appellant lying down. One the same day about 11.20am, the medical officer confirmed the death of the deceased.

[11] PW15 (Dr A Savior Selva Sureh) had on 17 September 2008 conducted a post mortem on the deceased. The external examination of the deceased's body revealed 28 injuries which he believed were caused by sharp object such as exhs P4A, PE6A and PE10A. The fatal injury was injury No 6 which was a stab wound that pierces the heart.

[12] The detail result of internal examination is as follows:

A	Head, Neck & Central Nervous System	
•	Scalp	Left temporalis muscle found contused
•	Skull	Intact
•	Brain/spinal cord	Sub arachnoid haemorrhage seen over left posterior parietal
•	Other	O/D — Injury No 1 — Stab pass through the right side of the neck structures which made a puncture at right external jugular vein with surrounding contusion and haemorrhage.
B	Cardiovascular System	
•	Pericardium	Slit by a stab over the pericardial sac seen over the apex. Pericardial sac filled with clotted and fluid blood.

A	•	Heart	1 x 0.2 x chamber deep stab over the apex, which enters in to left ventricle.
	•	Other	(Injury to the pericardium and heart are the extension of injury No 6)
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C	C	Thorax & Respiratory System	
	•	Oesophagus/Trachea	No abnormalities detected
C	•	Pleura & Pleural cavity	2.5 litres of fluid and clotted blood seen in the thoracic cavity.
	•	Ribs	0/D - Injury No.6- Stab passes through the 7th inter-costal space of left side chest at its medial clavicular line.
D	•	Right/Left-Lung	C/S-Pale
D	D	Abdomen/Gastro intestinal system/Peritoneal cavity	
	•	Stomach/content	50ml milky fluid diet
E	•	Liver/spleen	C/S-Pale
	E	Genito — Urinary System, Pelvic Cavity	
E	•	Right/Left — Kidney	C/S-Pale
	•	Urinary bladder	Empty
F	F	The Cause of Death:	
	•	Stab injury to the heart by a sharp cutting weapon.	

G [13] After subjecting the prosecution's evidence to a maximum evaluation, the learned trial judge was satisfied that the prosecution had succeeded in establishing a prima case of the two charges preferred against the appellant. The appellant was called to enter his defence.

H [14] The appellant elected to give evidence under oath. He presented a different story. According to the appellant, on the morning in question, a misunderstanding arose between him and the deceased. It started with the appellant taking two buckets of the water from the bath room. The deceased came suddenly and hurried the appellant to finish fast as the deceased also wanted to take bath. According to the appellant, the deceased did provoke him by uttering some insulting words, punched him on the face and after that the appellant went to his room and few minutes later he went back to ask the deceased why he punched him. The deceased replied 'Jadi kamu tidak puas hati lah?'.

[15] The deceased then went to take a *parang* and a sharp weapon. A struggle between them ensued and they punched each other. The appellant entered his room and took a knife and they fought. PW13 also assisted the deceased to assault him. The appellant said he was injured and bleeding all over his body.

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[16] The appellant said that he could not remember whether he had hurt PW12 because the deceased and PW12 kept on assaulting him and he had to fight back to defend himself.

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[17] According to the appellant, there was only fist fight at first. If the deceased had only insulted him and did not punch him, he would not have retaliated at all. He said, he would not have taken any weapon if the deceased has not taken a weapon first. The appellant said he had no plan to have a fight with the deceased and PW12 that morning.

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[18] In nutshell, the defence of the appellant is one of provocation and self-defence.

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THE APPEAL

[19] In the petition of appeal, the appellant raised a number of issues to challenge the learned trial judge's judgment. However, in our view, the determinative issue that called for our determination in this appeal is simply this: whether in the facts and circumstances of this case the appellant has been rightly convicted under s 302 of the PC, and if not, whether the act attributed to him would constitute a lesser offence of culpable homicide not amounting to murder punishable under s 304(a) of the PC.

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GRAVE AND SUDDEN PROVOCATION

[20] Learned counsel for the appellant submitted that even if we were to give full faith and credence to the prosecution evidence, an offence under s 302 of the PC is not made out and the appellant can at best, be punished only for an offence under s 304(a) of the PC. The contention is that the appellant had no intention to kill the deceased. It was not a case of premeditated murder. Learned counsel emphasised that there was no motive on the part of the appellant to harm, injure or kill the deceased. It was argued that the act of the appellant in stabbing the deceased was committed as a result of sudden and grave provocation. In substance, it was argued that the act of the appellant would fall under Exception 1 to s 300 of the PC.

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[21] On the contrary, learned deputy public prosecutor supporting the impugned judgment, submitted that the learned trial judge had carefully and properly analysed all the evidence presented before the court and rejected the

A defence raised by the appellant that the incident in question took place as a result of grave and sudden provocation. Learned deputy public prosecutor further contended that the findings of the learned trial judge were based on essentially question of fact and he urged this court not to disturb the said finding.

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[22] We shall first advert to some general principles of law governing grave and sudden provocation. The defence of provocation is contained in Exception 1 to s 300 of the PC. It reads as follows:

C Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

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(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

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(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

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[23] ‘Provocation’ has not been defined in the PC. The common law definition of provocation is best expressed by the classic direction of Delvin J in *R v Duffy* [1949] 1 All ER 932:

G Provocation is some act, or series of acts done (or words spoken) ... which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of himself.

H [24] Provocation operates as a partial defence to murder aimed at the reduction of that crime to the lesser offence of culpable homicide not amounting to murder. For a defence of provocation to succeed, the court must be satisfied that the accused was deprived of his or her self-control at the time of killing (the subjective test) and that this was the result of wrongful conduct serious enough to provoke a reasonable person (the objective test).

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[25] Provocations may vary from the less serious cases (eg verbal provocations) to those involving very serious wrong doings (eg provocation involving physical violence). Provocations involving different forms and

degrees of wrongdoing may equally support a partial defence to murder, provided that the requirement of loss of self-control is also satisfied. A

[26] In *Budhi Singh v S State of HP*, AIR 2013 SCW 457, the Supreme Court of India had this to say:

13. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury. B C D

[27] Thus, no straitjacket formula can be evolved to categorise what acts may amount to provocation much less grave and sudden provocation. E

[28] What would amount to 'grave and sudden provocation' will depend on the facts of each case. Dr Sri Hari Singh Gour's *Penal Law of India*, Vol 3 (Law Publishers (India) Pvt Ltd, (11th Ed) Revised, 2011), declares 'sudden' as follows (at p 2498):

What it is said that the provocation must be 'sudden' it is implied that it should have all immediately preceded the homicide in point of time. A person may repeated or continuous provocation arouse another to state of mind when the provocation immediately preceding the act is only the last straw. F

[29] In *Mahmood v State* AIR 1961 All 538, Oak J had noted (at pp 538–539): G

Whether the provocation was sudden or not does not present much difficulty. The word 'sudden' involves two elements. Firstly, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If a man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation. H

[30] With this principles in minds, we will proceed to consider whether in the circumstance of this case, the appellant can rely on the defence of sudden and grave provocation. The most material allegation by the appellant to be considered is the utterance of highly abusive and filthy words by the deceased. I

- A** At p 128 of the AR, the appellant testified as follows:
At first I took 2 buckets of water from the bath room that morning. Suddenly my neighbour came and told me that he wanted to take bath. He said 'laju, laju'. After that he said that I said 'sabar dulu lah. Saya belum lagi selesai'.
- B** [31] Continuing his narration of the event at p 129 of the AR, the appellant said as follows:
He said 'Dasar uduk kamu'
Translated to mean 'You are a dog'.
- C** I said to him why you said that. He said what do you want and he straight away punched my face.
How many times he punched you?
Once only.
- D** What happened next?
I went to my room and sat there for a while. Then I went and asked him why he punched me.
Did he answer you?
- E** He said 'jadi kamu tidak puas hati lah?'
Then we struggled. He punched me and I punched back. Then he took *parang* and a sharp weapon. Then I entered my room and took a knife and we fought.
- F** [32] The critical issue to be determined here is whether there was time elapsed between the provocation and the act which caused death. The learned trial judge held that the appellant himself admitted that he could have tolerated and would not retaliate if the deceased only insulted him that morning and did not punch him.
- G** [33] The learned trial judge further held that by this admission, it is clear that even assuming the deceased uttered the alleged insulting words to the appellant, the latter was not deprived of the power of self-control. Hence, the defence of provocation does not come within the Exception 1 to s 300 of the PC.
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- I** [34] In assailing the impugned judgment, learned counsel for the appellant submitted that the learned trial judge erred in holding that when the appellant stabbed the deceased, the passion of the appellant had cooled and he had regained his self-control. Granted that the appellant could have tolerated the initial provocation ('insulting words') by the deceased but that was not the end of the matter. The subsequent conduct of the deceased in challenging and punching the appellant again and in reaching to the *parang* was the last straw that broke the camel's back in depriving the appellant of his self-control.

Therefore, it was the contention of learned counsel that the appellant's act bore a reasonable relationship to sudden and grave provocation which would attract Exception 1 to s 300 of the PC. Learned counsel further submitted that the state of mind of the appellant, having regard to the earlier conduct of the deceased, should be taken into consideration in determining whether the subsequent act would be sufficient provocation to bring the case within the Exception. According to learned counsel, cumulative or sustained provocation has been recognised as one of the Exceptions to s 300 of the PC.

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[35] The learned deputy public prosecutor defended the findings of the learned trial judge and contending that the allegation of the provocation is 'a ring of afterthought'. The nature of the provocation and the provocative words were never put to the prosecution witnesses. Further, there was no such thing as series of provocation to be accumulated and therefore amount to grave and sudden provocation (see *Public Prosecutor v Abdul Razak bin Dalek* [2007] 2 MLJ 255; [2006] 4 CLJ 129(HC)).

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[36] Now, the concept of cumulative provocation has been recognised by Indian and Malaysian Courts. The learned authors of *Criminal Law in Malaysia and Singapore*, (2nd Ed) LexisNexis, 2012, had this to say (at pp 805–806):

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The Indian courts have recognised this concept of cumulative provocation ever since the inception of the Code. The early recognition of cumulative provocation is remarkable given that the English law at the time of the Code's promulgation restricted the provocative conduct to that which occurred immediately prior to the killing. The following third proposition of the Indian Supreme Court in *Nanavati* merely reaffirmed this longstanding position:

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The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

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This proposition has also been applied locally, with cases of domestic killings involving a long history of physical, emotional and mental abuse comprising a common instance. For example, in the Singapore High Court case of *PP v Sundarti Supriyanto*, the deceased had physically and emotionally abused her domestic maid for an extended period of time. The court held that this history of abuse comprised the 'mental background' of the accused which was relevant to the determination of grave provocation. Generally speaking, the judicial recognition of cumulative provocation does not replace the need for the provocative conduct to have been grave and sudden. As the Malaysian Federal Court in *Che Omar bin Mohd Akhir v PP* put it 'Devoid of its gravity and suddenness ... a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the (Penal Code).

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[37] In the case of *R v Ahluwalia* [1992] 4 All ER 889, Lord Taylor said:

- A We accept that the subjective element in the defence of provocation would not as a matter of law be negated simply because of the delayed reaction in such cases, provided that there was at the time of the killing a sudden and temporary loss of self-control caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation.
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- [38] We agree with the proposition of law above. In our considered opinion, the law had set no limit on the duration of a man's passion. This would vary from one individual to another, and would depend on the circumstances in which the killing took place. The background circumstances, such as earlier provocations, 'could be taken into account in determining whether a subsequent comparatively trial act of provocation ... could cause slumbering fire of passion to burst into flame' (see *The Queen v McGregor* [1962] NZLR 1069 at p 1080).
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- [39] Thus, in considering the question whether the appellant was actually provoked to lose his self-control, the court is entitled to consider the immediate act that caused death as well as all relevant circumstances preceding or surrounding that act. The nature of the alleged provocation, the manner in which the appellant reacted, the time which eloped between the provocation and the appellant's response, previous relations between parties, the sensitivity or otherwise of the appellant are relevant considerations to answering the subjective question on provocation.
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- [40] Another important fact to be noted is that in endeavouring to determine whether there has been 'time for his passion to cool off', a court is not required to resort to any mathematical formula or to arrive at any computation of time expressed in minutes or hour. The court must, however, conduct a careful circumstances of the case before it. In doing so, the court must seek to establish whether at the time of doing the act which caused death the passion of the accused had cooled off.
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- [41] Coming back to the case at hand, we see no reason to reject the evidence of the appellant that the deceased was the one who initiated the provocation by insulting the appellant and then punched him. Generally speaking, we agree with the submission of learned deputy prosecutor that the appellant should have put his defence to the prosecution witnesses (see *Megat Halim Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). However, this is not inflexible rules even in civil cases, and more so in a criminal case where greater latitude should usually be allowed. *Phipson on Evidence*, (10th Ed) at para 1542 stated as follow:
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... Failure to cross-examine, however, will not always amount to an acceptable of the witness's testimony, eg if the witness had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience e.g. to same time. And where several witnesses are called to the same point it is not always necessary to cross-examine them at all.

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[42] In this instant case, even though learned counsel for the appellant may not have put the appellant's case specifically to PW12 or prosecution's witnesses during the trial, but he did challenge the prosecution's version and put the appellant's case generally to PW12 (see pp 76–77 of the AR).

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[43] It is pertinent to note that the sole eye-witness in this case is PW12, the wife of the deceased and she herself had been involved in the fight where she suffered injuries which is the subject matter of the second charge. Therefore, her evidence ought to be treated with caution. In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805; the Federal Court had this to say:

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It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a purpose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration.

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[44] The Indian Supreme Court in *Raju @ Balachandran and Ors v State of Tamil Nadu* AIR 2013 SC 983 broadly identified four categories of witnesses as follows:

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33. For the time being, we are concerned with four categories of witnesses — a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. *A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.* (Emphasis Added.)

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[45] We have considered carefully the learned trial judge's judgment and we found the judgment was barren of any discussion of this issue. The learned trial judge should have analysed and weighed cautiously the evidence of PW12, who was an interested witness and was inimically disposed towards the deceased and made a specific finding whether her evidence was coloured or tainted in any way or did rest upon any basis of fact having regard to all circumstances of this case.

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- A [46] We agree with the submission of the learned counsel for the appellant that the story of the appellant must be accepted by the court. Based on the evidence, it was fair to infer that the subsequent conduct of the deceased in challenging, punching him again and in reaching for the *parang* had caused the appellant to lose his self-control. We are of the considered opinion that in the situation in which the appellant was confronted with, any reasonable man will do the same act which the appellant did.
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- C [47] It is an established principle of criminal jurisprudence that the defence is not required to prove its case with the same rigour as the prosecution and the defence is only required to prove its case on the balance of probabilities to entitle him to rely on any general exceptions of the PC (see s 105 of the Evidence Act). It is also trite that a scenario which favours the accused should be preferred in cases where multiple inferences may be drawn from the same set of facts (see *Tai Chai Keh v Public Prosecutor* [1948–1949] MLJ Supp 105b at p 108 and *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR 24 at p 85).
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- E [48] There was neither rhyme nor reason for the appellant to attack the deceased unless it was done while he was smarting under grave and sudden provocation. An important aspect to be noted here is there was no previous animosity between the appellant and the deceased. The relations between the appellant and the deceased were cordial. PW12, the wife of the deceased, portrayed a cordial and good relationship between herself and the deceased on one hand and the appellant on the other hand for over a period of four years. It is clear that the appellant had not committed the crime with any premeditation. There was no suggestion that the appellant had any enmity or motive to commit any offence against the deceased, leave alone a serious offence like murder.
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[49] In the case of *Public Prosecutor v Lasakke* [1964] 1 MLJ 56, it was held as follows:

- H On 8 June 1963, the accused killed the deceased with a *parang*. Prior to this, the deceased tried to have intercourse with the accused's wife. The accused was told of this but said nothing. The deceased told the wife that he wanted to marry her and threatened that if her husband would not divorce her he would kill him to achieve his purpose.
- I On 8 June 1963, the deceased met the accused and said: 'Eh? Have you divorced your wife yet?' Later the deceased again taunted the accused with these words: 'Eh, are you not ashamed? Don't you realize all your friends know I have interfered with your wife? Why don't you divorce her?' The accused did nothing but tears of shame came into his eyes. Later on the deceased struck the accused on the head. There was a commotion as a result of which the deceased was killed.

Held: the series of grave provocations deprived the accused of his power of self-control and the final provocation, having regard to all the circumstances of the case, was sufficiently grave and sudden to prevent the offence from amounting to murder. A

[50] In our considered opinion, the insulting words ('You are a dog') must not be looked in isolation from the subsequent conduct of the deceased when he challenged, punched the appellant again and reached for the *parang*. The insulting words served as the setting for the triggering of the second incident. Any reasonable man in the above situation would be provoked and would be deprived of the power of self-control. The fact that there were 28 injuries sustained by the deceased does not in our considered opinion affect the matter adversely to the appellant because a reaction to provocation necessarily involves a lack of ability to exercise restraint or to judge a situation with insight and balance. As said by Homes J in *Brown v United States* 256 US 335 (1921): B C D

Detached reflection cannot be demanded in the presence of an uplifted knife.

[51] In the result, on the ground of sudden and grave provocation, we allowed the appeal but only to the extent that instead of a conviction under s 302 of the PC, the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under s 304(a) of the PC. E

THE SENTENCE

[52] As is customary in our courts particularly in cases as tragic as this one, the role of defence counsel is significantly reduced to persuading the court to temper justice with mercy. Learned counsel for the appellant did not deviate from that role. Learned defence counsel submitted that the appellant was caused to loss self-control by the thing said or done by the deceased. The appellant's loss of control is reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions. The appellant was remorseful. Had the prosecution reduced the charge to a lesser offence from the beginning, the appellant would have pleaded guilty. The appellant is an Indonesian national. He will be deported to Indonesia after serving sentence; so he is not a potential threat to the Malaysian society. The appellant is not an educated man. He is still single and worked in tongkang to support his siblings in Indonesia. F G H

[53] Learned deputy public prosecutor urged the court to impose a deterrent sentence as the offence was a serious one and a life has been lost. The appellant or his counsel did not make any representation to Attorney General's Chambers and sought to reduce the charge. I

A [54] Now, the criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Proportion between crime and punishment remain an important consideration in the determination of sentence. The practice of punishing all serious crimes with equal severity is not known to civilised society

B (see *Public Prosecutor lwn Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 559).

[55] After giving due consideration to the facts and circumstances of this case, we are of the considered opinion that the end of justice would be served if the appellant is sentenced to undergo 18 years of imprisonment with effect from the date of arrest. We take into account that the loss of life, whether intentional or not, always a serious and heinous crime, and society demands that it must be served with the appropriate sentence.

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D THE SELF-DEFENCE

[56] As we have stated earlier, the appellant also raised the defence of self-defence. Concerning this defence, we have carefully perused the record of appeal and the submissions of both counsels and found it to be totally devoid of any merit. The self-defence raised by the appellant did not fulfil the conjunctive requirements as provided under ss 96–106 of the PC (see *SS Mujebur Rahman bin Mohd Sultan lwn Pendakwa Raya* [2013] 3 MLJ 867; [2012] 1 LNS 1301; *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR 306). The only issue that needs to be considered is the allegation of the failure of on the part of the prosecution to tender the medical report on the appellant during the trial.

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[57] The central plank of learned counsel's submission is that the appellant had suffered serious injuries which could be gathered from the testimonies of the various witnesses called during the trial and the photograph of the appellant (exh P8(c), p 471, Vol 7 of the AR). This fact was also supported by the evidence of PW12 when she said at p 98, line 13 to 14 of the AR as follows:

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H I saw Rikky Purba suffered multiple injuries too. I could not identify the injuries as he was covered with blood on his body.

[58] Learned counsel for the appellant forcefully submitted that the appellant is prejudiced by the failure on the part of the prosecution to provide the appellant with his medical report. This is because the injuries sustained by the appellant would have corroborated his version of self-defence in the High Court. The location, length, depth and width of any stab wounds would also provide opportunities for this court to draw inferences either in support of or against the appellant's version.

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- [59] With respect, the submission is devoid of merit. We agree with the submission of learned deputy prosecutor that the appellant should have cross-examined PW17 (Dr Su Mee Ling) who received the appellant in Sibul Hospital on the issue of injuries sustained by the appellant. Furthermore, there is no evidence apart from the evidence of PW12 that other medical officer did receive the appellant. A B
- [60] In our considered opinion, the prosecution is not obliged to explain the injuries on the accused in all cases and in all circumstances. It depends upon the facts and circumstances of each case. One of the important factors to be considered is whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused. In the case of *Ramlagan Singh v State of Bihar* [1973] 3 SCC 881, the court held that the prosecution is not called upon in all cases to explain the injuries received by the accused person. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused person. When this was not done, there is no occasion for the prosecution witnesses to explain the injuries on the person of the accused. C D
- [61] In this instant cases, the record showed that the alleged injury sustained by the appellant has not been put to the prosecution witnesses and so they had no occasion to explain the same. In such circumstances, the failure on the part of the prosecution to tender the medical report of the appellant would not affect the prosecution case, which has been accepted by the learned trial judge. E
- [62] Therefore, the defence of self-defence raised by the appellant must fail. F
- [63] As regards the second charge under s 324 of the PC, we agree with the findings of the learned trial judge that there was sufficient evidence to establish that the appellant had attacked her by stabbing her on her right hand, on her left thigh, below the arm pit and on the chest. The weapon used by the appellant was the same knife ie PE6A that the appellant used to attack the deceased. G
- [64] Therefore, the appeal against the second charge is without merit. H
- [65] Before we conclude, we would like to say something concerning the interference of the finding of fact of the trial judge by appellate court. Generally speaking, an appellate court will not ordinarily disturb the findings of a subordinate court unless such findings are plainly wrong or there had been an insufficient judicial appreciation of the evidence before it. However, upon careful perusal of the appeal records, and after having heard the parties at great length, we are of the considered opinion that this is a case in which appellate intervention is warranted. I

A [66] In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 739, Abdul Hamid Mohamed FCJ, (as he then was) observed as follows:

B Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh's* case 'there are substantial and compelling reasons for disagreeing with the finding.' Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

C (see also *Jagatheesen s/o Krishnasamy v Public Prosecutor* [2006] 4 SCR 45; *Public Prosecutor v Selvarajoo all Ramachandran & Ors* [2005] 5 MLJ 282; *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523).

D CONCLUSION

E [67] For all the above reasons, the appeal is allowed to the extent as stated earlier.

Appeal allowed in part.

Reported by Afiq Mohamad Noor

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